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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-106

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 442 F.2d 159. The opinion of the district court (Pet. App. A36) is reported at 311 F. Supp. 1002.

JURISDICTION

The judgment of the court of appeals (Pet. App. A34-A35) was entered on April 22, 1971. The petition for a writ of certiorari was filed on July 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Revised Philadelphia Plan for employment practices by contractors engaged in federally-assisted construction projects is a lawful exercise of federal executive power.

STATUTES INVOLVED

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)–2(a), Section 703(j) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)–2(j), and Section 158(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3), are set forth in the Appendix, *infra*.

STATEMENT

This suit involves a challenge to the validity of the Revised Philadelphia Plan, which was adopted by the Department of Labor pursuant to Executive Order 11246 (3 C.F.R. (Jan. 1, 1966, Rev.) 567; C.A. App. 56a),[1] and is designed to increase overall minority-group[2]

[1] "C.A. App." refers to the "Appendix to the Briefs" filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court. The Executive Order provides, among other things, that federal contracts, including contracts for federally assisted construction jobs, shall contain provisions obligating the contractor and his subcontractors not to discriminate in employment on account of race, color, religion, sex or national origin, and requiring contractors and subcontractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color or national origin" (C.A. App. 57a). See also 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Executive Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967), superseded in part by Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

[2] Under the Plan, the term "minority group" means "Negro, Oriental, American Indian and Spanish surnamed Americans" (C.A. App. 30a).

employment in six specified trades in the construction industry in the five-county Philadelphia area covered by the Plan.[3] The plaintiffs include certain labor and management organizations and companies engaged in construction activities in the affected area.

For construction contracts which are subject to Executive Order 11246 and in which the estimated cost of the project exceeds $500,000, the Plan requires that the affirmative action program submitted by each contractor with his bid must include "specific goals of minority manpower utilization" which are within the ranges included in the invitation for bids (*id.* at 18a).[4]

The Plan, which went into effect on September 29, 1969, covers six construction trades—ironworking, plumbing and pipefitting, steamfitting, sheetmetal, electrical and elevator construction. The Plan is based on the Department of Labor's findings that although over-all minority-group employment in the construction industry in the five-county Philadelphia area was 30 per cent, in the six trades affected by the Plan it

[3] The Plan is contained in two separate orders issued by the Department of Labor in June and September of 1969 (C.A. App. 17a, 32a).

[4] The Plan sets forth ranges within which the contractor's minority-group employment goals must be set. These ranges are established each year for the ensuing four years, and vary between 4 and 9 percent minority employment during the first year and from 19 to 26 percent minority employment during the fourth year (C.A. App. 46a–47a). The ranges are based primarily on findings concerning the availability of minority-group persons for employment and the impact of such a program on the existing labor force. See generally C.A. App. 34a–43a.

was approximately one percent (*id.* at 34a–35a).[5] The Department of Labor determined that special measures were necessary to provide equal employment opportunity in these six trades in accordance with the requirements of the Executive Order.[6]

This litigation arose out of a Department of Agriculture grant of approximately $1.1 million to the Commonwealth of Pennsylvania in connection with a water conservation project, costing a total of approximately $4 million. Invitations for bids, including the requirements of the Philadelphia Plan, were issued by the State in November 1969, and in January 1970 this action was filed in federal district court challenging the inclusion of such a provision in the invitation, and naming, among others, certain federal officials as defendants. The district court granted the federal defendants' motion for summary judgment,[7] and the court of appeals affirmed.

[5] The Department of Labor found that the small number of Negroes in these trades was due to the exclusionary practices of the labor organizations representing employees in these trades, including their failure to admit Negroes to membership or appenticeship programs, and to the preferences in work referrals granted to union members and to persons who had work experience under union contracts (C.A. App. 18a–19a).

[6] C.A. App. 21a. Pursuant to regulations, the Director of the Office of Federal Contract Compliance in the Department of Labor has the authority to issue rules implementing E.O. 11246, 41 C.F.R. 60–1.2. This delegation was made pursuant to Section 401 of Part 4 of E.O. 11246 (3 C.F.R., *supra*, p. 575), which, in pertinent part, provides the "Secretary of Labor may delegate * * * any function or duty * * * [to issue rules and regulations' implementing E.O. 11246] except authority to promulgate rules and regulations of a general nature."

[7] As to certain of the plaintiffs, the district court granted, on standing grounds, the federal defendants' motion to dismiss

ARGUMENT

The Revised Philadelphia Plan provides goals and timetables for minority participation in six trades in federally-assisted construction work in the Philadelphia area, where such participation in those trades has previously been one percent or less. Because similar plans have been adopted in Washington, Atlanta, St. Louis and San Francisco, and may well be adopted in other large metropolitan areas, the Philadelphia Plan is a major element in the government's program to provide equal employment opportunities to minority workers. As both courts below recognized, adoption of the Plan was well within the authority of the Department of Labor (and the President) and the Plan is fully consistent with Title VII of the Civil Rights Act of 1964. For that reason, and because the decision below is in accord with other judicial decisions involving similar plans,[8] further review by this Court is not warranted.

1. The courts below correctly held that the federal executive has the authority to require fair employ-

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the action. The standing question was raised on appeal, but the court of appeals found it unnecessary to reach the issue since "[a]ll plaintiffs have been represented by the same attorney, and the presence or absence of the Association as a plaintiff has no practical significance" (Pet. App. A10).

[8] *Weiner* v. *Cuyahoga Community College District*, 238 N.E. 2d 839, affirmed, 249 N.E. 2d 907 (S. Ct. of Ohio), certiorari denied, 396 U.S. 1004 (concerning the former Cleveland Plan); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D. N.J.) (New Jersey Medical College Plan); *Southern Ill. Builders Ass'n* v. *Ogilvie*, No. 4748, S.D. Ill., decided May 7, 1971.

ment conditions in construction contracts involving projects supported, in whole or in part, by federal funds. In reaching that conclusion, the court of appeals rejected the contention, renewed here, that such action by the executive amounts to legislation which, to be lawful, must originate in Congress. The court noted that "discrimination in employment [is] likely to affect the cost and progress of projects in which the federal government [has] both financial and completion interests" (Pet. App. A20) and held that, in order to protect those interests, "inclusion [of the Philadelphia Plan provisions] as a precondition for federal assistance [is] within the implied authority of the President and his designees" (*id.*). Recognition of this authority is especially compelling when the matter is viewed in light of the firm commitment Congress has made against racial discrimination in employment practices. See generally Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*

Given the Executive's general authority to require fair employment conditions in construction contracts such as the one involved here, the specific requirements of the Philadelphia Plan, so long as they violate neither the Constitution nor federal law, are a proper exercise of the federal government's right to set "the terms and conditions upon which its money allotments * * * [are] disbursed." *King* v. *Smith*, 392 U.S. 309, 333 n. 34. See *Joyce* v. *McCrane*, 320 F. Supp. 1284, 1290 (D. N.J.); *Southern Illinois Builders Association* v. *Ogilvie*, No. 4748 (S.D. Ill., May 7, 1971) (slip op., p. 12); cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Moreover, Congress, with full knowledge of executive activities in this area, has indicated its approval. Not only has Congress explicitly acknowledged the validity of the Executive Order upon which the Plan is based (see 42 U.S.C. 2000e–8(d); see also 110 Cong. Rec. 13650–13652 (June 12, 1964)), and, "aware of Presidential action with respect to federally assisted construction projects since June of 1963, * * * continued to make appropriations for such projects" (Pet. App. A 20), but it has also rejected a legislative attempt to ban use of federal funds to finance contracts which contain the Philadelphia Plan provisions. See 115 Cong. Rec. S. 17131–17151, Dec. 18, 1969 (daily ed.); 115 Cong. Rec. S. 17625–17636, Dec. 22, 1969 (daily ed.); S. Rep. No. 91–616, 91st Cong., 1st Sess., p. 19 (1969).

2. The court of appeals also correctly "reject[ed] the contention that Title VII [of the 1964 Civil Rights Act] prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades" (Pet. App. A24–A25). For, as that court noted, "[t]o read [the anti-discrimination provisions of Title VII] in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils" (Pet. App. A24).[9] It is, of course, contemplated that

[9] This applies equally to the contention that Section 703(j) of Title VII, 42 U.S.C. 2000e–2—the anti-preferential treatment provision—invalidates the affirmative action program

those employers subject to the Plan will make race or national origin a factor for consideration in the hiring process. Even in the absence of a judicial finding of prior discrimination based on race,[10] this kind of color consciousness, designed to prevent or remedy a pattern of racial discrimination, does not violate the equal protection clause of the Fourteenth Amendment. See, *e.g.*, *Porcelli* v. *Titus*, 431 F. 2d 1254 (C.A. 3); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931 (C.A. 2); *Offermann* v. *Nitkowski*, 378 F. 2d 22 (C.A. 2); cf. *McDaniel* v. *Barresi*, 402 U.S. 39, 41. And in light of the Plan's inherent remedial purpose, there is plainly no conflict with Title VII.[11] See *Joyce* v. *McCrane*, *supra*, at 1291; *Southern Illinois Builders Association* v. *Ogilvie*, *supra*, at 15.

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embodied in the Revised Philadelphia Plan. That provision does not purport to be a prohibition, but is, instead, simply a disclaimer of granting new power. As the court of appeals stated, "Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal" (Pet. App. A 22). Cf. *Swann* v. *Board of Education*, 402 U.S. 1, 16–18 (construing similar provisions in Title IV of the 1964 Civil Rights Act, 42 U.S.C. 2000c, *et seq.*).

[10] Such a finding is not required here, since the ultimate authority for the Plan inheres in the federal government's right to contract on its own terms. Of course, where there has been a judicial finding of discrimination in violation of either the Constitution or statute, courts can require that race be taken into account as part of the remedial process. See, *e.g.*, *Swann* v. *Board of Education*, *supra*, at 19; *United States* v. *Montgomery County Board of Education*, 395 U.S. 225.

[11] The "affirmative action" requirement of the Executive Order is apparently premised on the idea that "color-consciousness * * * [is] an appropriate remedial posture" (Pet. App. A24). Accordingly, contrary to petitioners' assertion, there is no inconsistency between the nondiscrimination provision of the

3. Finally, the court of appeals correctly held that the Plan is consistent with federal law protecting exclusive union referral systems. The Revised Philadelphia Plan provides that "'[i]t is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees'" (Pet. App. A25). Implied in this, of course, is the "requirement that the contractor look to other sources for employees if the unions fail to refer sufficient minority group members" (Pet. App. A26). While this may, in some circumstances, place the contractual undertakings of a contractor bidding on a federally assisted project at variance with the hiring hall arrangements contained in his collective bargaining agreement, such an agreement, even where lawful,[12] cannot immunize the contractor from the requirements lawfully imposed upon him by the Plan.[13] Indeed, if this were not so, "the employer

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Executive Order and the specific requirements of the Plan. Moreover, as the court of appeals noted, "more than ordinary deference [should be given] to an administrative agency's interpretation of an Executive Order or regulation which it is charged to administer" (Pet. App. A29). See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434; *United States* v. *City of Chicago*, 400 U.S. 8; *Udall* v. *Tallman*, 380 U.S. 1.

[12] Of course, collective bargaining agreements which perpetuate the effects of past discrimination are unlawful under Title VII and invalid. See, *e.g.*, *United States* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123, 132 (C.A. 8); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (C.A. 5).

[13] While the National Labor Relations Act does authorize use of the kind of exclusive referral systems involved here, the practice is certainly not required (Pet. App. A26). See generally 29 U.S.C. 158(a)(3).

[could] evade [the] obligation by contracting away his power to perform it," thereby reducing the Plan to "an exercise in futility" 42 Op. Att'y Gen., Op. No. 37 (1969), at p. 9. Cf. *Federal Housing Administration* v. *The Darlington*, 358 U.S. 84, 91; *Fleming* v. *Rhodes*, 331 U.S. 100, 107. Thus, since there is "[n]othing in the National Labor Relations Act [which] purports to place any limitation upon the contracting power of the federal government" (Pet. App. A26–A27), it is plain that the United States, acting through the executive branch, is free to insist that its contractors depart from their customary reliance on union referrals where that practice conflicts with the employers' obligation to provide equality of employment opportunity under a valid Executive Order.[14]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

[14] The difference in the opinions previously expressed by the Comptroller General (see 49 Dec. Comp. Gen. 59 (1969)) and the Attorney General (42 Op. Att'y Gen., Op. No. 37 (1969)) on the Philadelphia Plan does not require review of the decision below by this Court. Since federal funds are being disbursed under the Plan, petitioners' allegations of "conflict" and "uncertainty" (Pet. 8–9) are, at most, extremely speculative.

APPENDIX

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)-2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(j) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)-2(j), provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment

by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area:

Section 158(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3), provides:

(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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